STATE OF MICHIGAN

IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff/Appellant, and Cross-Appellee,

v.

AUTO OWNERS INSURANCE COMPANY, a Michigan corporation,

Defendant/Appellee, and Cross-Appellant.

_____/

Supreme Court Docket No. 122601

Court of Appeals Docket No. 233826

Lower Court No. 92-2882-NF
Hon. Charles D. Corwin

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DEFENDANT-APPELLANT AUTO-OWNER INSURANCE COMPANY'S CROSS-APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

In this Cross-Application for Leave to Appeal, Defendant Auto-Owners Insurance Company seeks leave to appeal, and reversal of, that portion of the Court of Appeals' decision of October 4, 2002 affirming the trial court's conclusion that no-fault penalty interest is due pursuant to MCL 500.3142.

Auto-Owners Insurance Company, issued a nonrenewal notice for the automobile insurance policy issued to Plaintiff, Antonio Morales, prior to the time when he was involved in an automobile accident. The trial court originally dismissed the case on this basis, finding that there was no policy in effect at the time of the plaintiff's accident, and the Court of Appeals affirmed the decision of the trial court in Docket No. 178479. This Honorable Court then reversed, holding that there was a question of fact whether Auto-Owners should be estopped from enforcing the nonrenewal clause in the policy because of various notices sent to the insured. *Morales v Auto-Owners Ins Co,* 458 Mich 288, 291-293; 582 NW2d 776 (1998). This Court remanded the case for trial on the issue of whether Auto-Owners should be estopped from enforcing the nonrenewal of the insurance policy.

On remand, the jury found that Auto-Owners was estopped to enforce its nonrenewal of the policy, and Auto-Owners paid the amount of no-fault benefits plaintiff claimed were due. The trial court then awarded Plaintiff no-fault penalty interest at the rate of twelve percent on all Plaintiff's medical bills pursuant to MCL 500.3142, holding that reasonable proof of coverage was irrelevant to the determination whether reasonable proof of the fact and amount of loss had been submitted by the policyholder. The trial court further awarded prejudgment interest on the underlying judgment, and on top of the no-fault penalty interest, including interest during the four years when the case was on appeal. Auto-Owners appealed.

The Court of Appeals, in an unpublished decision issued October 4, 2002, affirmed in part, reversed in part, and remanded. In its opinion, the Court of Appeals affirmed the trial court's conclusion that penalty interest under MCL 500.3142 was due. *Id* at p 2. The Court of Appeals reversed the trial court's award of prejudgment interest, holding that prejudgment interest does not continue to accrue during the appellate process, citing *Dedes v Asch*, 233 Mich App 329, 340; 590 NW2d 605 (1998), *lv den*, 463 Mich 980; 624 NW2d 186 (2001). The Court of Appeals remanded for a redetermination of the amount of prejudgment interest for which Auto-Owners is liable. *Id* at p 3.

Following the Court of Appeals' decision, Plaintiff-Appellee filed an Application for Leave to Appeal with this Court on October 24, 2002, seeking reversal of the portion of the Court of Appeals' decision holding that prejudgment interest does not accrue during the appellate process. Defendant opposes granting leave with respect to the prejudgment interest issue, and has filed a brief opposing Plaintiff's Application for Leave to Appeal. Through this Cross-Application for Leave to Appeal, Defendant seeks leave to appeal the October 4, 2002 decision of the Court of Appeals with respect to the proper interpretation of MCL 500.3142 regarding no-fault penalty interest, and the reversal of that portion of the decision, regardless whether Plaintiff's Application is granted.

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD THAT REASONABLE PROOF OF THE FACT AND THE AMOUNT OF LOSS HAD BEEN SUBMITTED PURSUANT TO MCL 500.3142 EVEN THOUGH THERE WAS NO REASONABLE PROOF THAT AN INSURANCE POLICY EXISTED UNTIL AFTER THE JURY DETERMINED THAT DEFENDANT WAS ESTOPPED TO NONRENEW COVERAGE?

Defendant/appellee/cross-appellant says "yes."

Plaintiff/appellant/cross-appellee says "no."

The Court of Appeals says "no."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Nature of the Proceedings

This case arises out of a no-fault automobile insurance policy issued by defendant Auto-Owners Insurance Company to plaintiff Antonio Morales pursuant to MCL 500.3101. On December 3, 1991, Antonio Morales was involved in an automobile accident that resulted in severe brain injuries. Auto-Owners denied personal protection benefits to Mr. Morales because his policy had been nonrenewed prior to the accident. MCL 500.3113(b).

Plaintiff disputed the effectiveness of the nonrenewal notice, claiming coverage was in effect. Plaintiff originally purchased a no-fault automobile insurance policy from Auto-Owners on November 27, 1985. Under the terms of the policy, the Company could elect to not renew the policy so long as written notice of nonrenewal was sent not less than 20 days prior to the expiration date. In addition, the policy cancelled automatically if the named insured failed to pay the premium as due. Plaintiff was on a "flex-bill" program which allowed the premium to be paid in monthly installments. (Dkt. #27.)

The automobile insurance policy issued to plaintiff was automatically renewed for nearly six years, although plaintiff frequently paid his monthly installments late. On July 24, 1991, plaintiff was involved in a minor accident, which led defendant to review his driving record and determine that his policy should not be renewed at the end of the current six-month term, expiring on November 27, 1991. A notice on nonrenewal was sent to plaintiff on September 9, 1991, which advised Mr. Morales that the policy would expire on November 27, 1991, the end of the policy term.

Subsequently, defendant sent two different notices of cancellations for failure to pay installment premium payments when due. Each time, plaintiff corrected the situation by paying

the overdue premiums, and defendant sent notices allowing reinstatement. On November 27, 1991, six days before the accident, the nonrenewal took effect pursuant to the nonrenewal notice and coverage expired. The various notices of cancellation for failure to pay premium and the notice of nonrenewal of the policy were summarized by the Michigan Supreme Court in a prior opinion issued in this matter, *Morales v Auto-Owners Ins Co,* 458 Mich 288, 291-293; 582 NW2d 776 (1998).

After plaintiff's accident on December 3, 1991, plaintiff filed suit through his wife, claiming that the plaintiff was unaware that his coverage had expired. Plaintiff asserted that defendant was estopped from nonrenewing the policy, claiming that the various notices created confusion leading plaintiff to believe that he still had coverage at the time of the accident. *Morales* at 293.

B. The First Appeal

On August 1, 1994, the trial court heard cross motions for summary disposition by the parties. In ruling on the motion, the trial court indicated there were three relevant issues: (1) was a notice of non-renewal sent to the plaintiffs; (2) does an intervening cancellation and reinstatement effect the validity of a pre-existing nonrenewal notice, and (3) did the policy terminate at the end of the policy period due to non-payment of premium. In ruling in defendant's favor, the court first indicated that the plaintiff had not shown any valid factual dispute concerning the mailing of the nonrenewal notice. (Dkt. # 39, pp. 20-21.) Second, the court stated that it was compelled by the case of *Slaughter v Smith*, 167 Mich App 400; 421 NW2d 702 (1988) to find that the notice of non-renewal necessitated by the plaintiff's successive accumulation of points was somehow nullified by subsequent cancellation and reinstatement for non-payment of premium. (Dkt. # 39, pp. 21-22.) Finally, the court ruled that the policy

automatically was non-renewed at the end of the policy period when the plaintiff did not pay the required premium to renew the policy, regardless of whether defendant sent notice of non-renewal. (Dkt. # 39, pp. 29-31.)

Plaintiff filed a claim of appeal. (Dkt. #35.) On appeal, the Court of Appeals affirmed in a split unpublished opinion per curiam, issued on September 3, 1996. (Docket No. 178479). The opinion affirmed the dismissal of the case, with the majority agreeing that the policy was not renewed at the end of the policy term. The dissenting judge disagreed, stating that the policy required a nonrenewal notice be sent even if the insured was late in making payments. *Id.* Both parties filed an application for leave to appeal, and leave was granted by the Michigan Supreme Court, 456 Mich 902; 572 NW2d 13 (1997).

On July 28, 1998, this Court issued a split opinion reversing and remanding the case to the trial court. The Court held that because defendant "repeatedly accepted plaintiff's late payments and continually renewed the plaintiff's policy," the principle of equitable estoppel barred defendant from enforcing the automatic nonrenewal provision of the insurance contract. *Morales*, 458 Mich at 295.[1]

On appeal, Auto-Owners had also argued that even if it was barred from enforcing the automatic nonrenewal provision of the contract, it had provided the appropriate notice of nonrewal to plaintiff in accordance with the policy terms. On this issue, the Supreme Court held:

> However, just as in *Mooney*, we believe questions of fact exist whether plaintiff reasonably relied on the reinstatement notice in not seeking insurance coverage elsewhere. The series of notices of nonrenewal, cancellation, and renewal allows plaintiff to argue that defendant is estopped from arguing that it properly notified plaintiff of nonrenewal under the terms of the policy. Plaintiff has alleged facts sufficient to prevent summary disposition in favor of defendant on this issue; however, plaintiff must still prove his case for estoppel before the trier of fact.

[1] Justice Taylor dissented, noting that the "majority exemplifies in marked degree that hard cases make bad law." *Morales*, 458 Mich at 305.

Morales, 458 Mich at 304. Auto-Owners' motion for rehearing was denied on September 10, 1998, and the case remanded to the trial court.

C. The Proceedings Upon Remand

After the case was remanded, defendant stipulated that the medical expenses incurred by plaintiff were reasonable and that the services were reasonably necessary through responses to requests to admit. (Dkt. #89.) As a result, the case was submitted to the jury on the sole question of whether coverage was in effect at the time of the accident based on the estoppel theory asserted by the plaintiff in response to defendant's notice of nonrenewal. The jury returned a verdict in plaintiff's favor on February 24, 2000, finding that defendant was estopped to deny coverage under the policy. (Dkt. # 148.) Defendant's motion for judgment notwithstanding the verdict and/or new trial was denied. (Dtk. # 177.)

On or about May 25, 2000, plaintiff filed a motion for partial summary disposition, asserting that it was entitled to "no-fault penalty interest" pursuant to MCL 500.3142. (Dkt. # 166.) In its motion, plaintiff argued that no-fault penalty interest was recoverable, and runs from 30 days after each invoice for medical care is submitted to the insurer. Plaintiff also argued that he was entitled to attorney fees pursuant to MCL 500.3148, contending that Auto-Owners' refusal to pay no-fault penalty interest was not reasonable. *Id.*

On June 9, 2000, Auto-Owners filed its response to the motion for partial summary disposition arguing penalty interest was inappropriate in this case because benefits were not "due" until the jury found that a policy was in effect on the basis of equitable estoppel. Until the jury made that finding of fact, Auto-Owners argued that it did not have "reasonable proof of the fact and amount of the loss" as required by MCL 500.3142. (Dkt. # 181.) Defendant's response also noted that plaintiff never raised the issue of no-fault penalty interest at trial and therefore,

the jury was never asked to decide whether the benefits were overdue. Further, the defendant cited a number of cases for the proposition that the purpose of no-fault penalty interest is to penalize an insurer that is recalcitrant in refusing to pay benefits. Because there was no policy in effect at the time of the accident, and such a policy was imposed only by virtue of estoppel, defendant argued that plaintiff was not entitled to no-fault penalty interest, and that penalty interest would begin to run thirty days after the jury's verdict was reduced to judgment. Defendant also denied that plaintiff was entitled to attorney fees under §3148, as the issue was reasonably in dispute. *Id.*

On July 12, 2000, the trial court entered an Order for Partial Summary Disposition as to No-Fault Penalty Interest, holding that Auto-Owners was required to pay plaintiff no-fault penalty interest from the date each medical invoice was submitted in an amount to be calculated, and attorney fees for the preparation and argument of the motion for partial summary disposition. The trial court also ordered that prejudgment interest under the Revised Judicature Act should be modified to reflect the revised amount of the Judgment. (Dkt. # 187.)

On September 27, 2000, the trial court entered a Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties. (Dtk. # 195.) At the time of the Judgment, the principal balance of benefits owed, incurred through April 30, 2000, together with prejudgment interest through September 1, 2000 of $216,519.68, totaled $998,152.95. The State of Michigan, who had appeared as an intervening party as a result of a lien for benefits paid, sought reimbursement of benefits in the amount of $98,970.82. As a result, the Judgment provided for payment of principal benefits and prejudgment interest in the total amount of $1,097,123.77. The Judgment also ordered Auto-Owners to pay no-fault penalty attorney fees in the amount of $2,540.00, and no-fault penalty interest in an amount to be determined. The Judgment stated that

it was a final judgment disposing of all claims and adjudicating all the rights and liabilities of all the parties. (Dkt. # 195.) Auto-Owners paid plaintiff the $1,097,123.77 reflected in the Judgment on September 5, 2000.

On October 17, 2000, Auto-Owners filed a Claim of Appeal arising from the September 27, 2000 Judgment. On November 8, 2000, this Court dismissed the appeal, holding that the Judgment was not a final judgment because it did not determine the amount of no-fault penalty interest was owed. The case returned to the lower court.

On December 29, 2000, defendant filed (i) a Supplemental Brief in Support of a Motion that the Court Find No-Fault Penalty Interest is Not Due Prior to the Jury Verdict, and (ii) a Motion for Relief from Judgment on Prejudgment Interest Entered on September 27, 2000 Pursuant to MCR 2.612(A) and (C). In the Supplemental Brief, defendant sought entry of a final order with respect to no-fault penalty interest so that issue could be pursued on appeal, and reiterated its position that the trial court improperly awarded no-fault penalty interest based on the facts of the case. In its Motion, defendant sought a determination from the trial court that prejudgment interest was not due and owing for the time period the case was appeal, i.e., from August 1, 1994 to July 28, 1998. (Dkt. # 204 and 205.) Defendant filed a supplemental brief on January 31, 2001. (Dkt. #208.) Plaintiff opposed the motion, arguing that it was entitled to no-fault penalty interest and arguing that it was entitled to prejudgment interest for the entire four years the case was on appeal. (Dkt. # 209 and 210.) The motion was heard on February 26, 2001. At the motion, the trial court ruled from the bench. In its ruling, the trial court held that plaintiff was entitled to no-fault penalty interest from the date of submission of each claim. (Dkt. # 214, p. 26.) With respect to defendant's request for relief from prejudgment interest, the trial

court held that prejudgment interest was appropriate for the entire length of the case, including the time when the case was on appeal. (Dkt. # 214, pp. 27-28.)[2]

An Order was entered on March 26, 2001. (Dkt. # 216.) A revised Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties was entered by the Court on March 26, 2001. (Dkt. # 217.) The pertinent orders of the trial court are attached as Exhibit 1. An appeal to the Court of Appeals followed.

D. The Decision of the Court of Appeals

The Court of Appeals, in an unpublished decision issued October 4, 2002, affirmed in part, reversed in part, and remanded. (Ex. 2.) In its opinion, the Court of Appeals affirmed the trial court's conclusion that penalty interest under MCL 500.3142 was due, holding that Auto-Owners' interpretation of the statute was not supported by the language of that statute. *Id* at p 2. The Court of Appeals reversed the trial court's award of prejudgment interest, holding that prejudgment interest does not continue to accrue during the appellate process, citing *Dedes v Asch*, 233 Mich App 329, 340; 590 NW2d 605 (1998), *lv den*, 463 Mich 980; 624 NW2d 186 (2001). The Court of Appeals remanded for a redetermination of the amount of prejudgment interest for which Auto-Owners is liable. *Id* at p 3.

Following the Court of Appeals' decision, Plaintiff-Appellee filed an Application for Leave to Appeal with this Court, seeking reversal of the portion of the Court of Appeals' decision holding that prejudgment interest does not accrue during the appellate process. Defendant opposes granting leave with respect to the prejudgment interest issue, and has filed a Brief opposing Plaintiff's Application for Leave to Appeal. Through this Cross-Application for

[2] The trial court also noted that the motion to amend the judgment was timely made, a finding that was not appealed by plaintiff. (Dkt. #214, p. 216.)

Leave to Appeal, Defendant seeks leave to appeal the decision of the Court of Appeals with respect to the proper interpretation of MCL 500.3142 regarding no-fault penalty interest.

ARGUMENT

I. THE COURT OF APPEALS COMMITTED CLEAR ERROR BY FINDING THAT PLAINTIFF WAS ENTITLED TO NO-FAULT PENALTY INTEREST IN A CASE WHERE THE INSURANCE POLICY WAS IMPOSED ON THE BASIS OF EQUITABLE ESTOPPEL AND THE INSURER TIMELY PAID THE BENEFITS AFTER THE JURY DETERMINED THAT DEFENDANT WAS ESTOPPED FROM NONRENEWING THE INSURANCE POLICY.

The Court of Appeals' decision with respect to no-fault penalty interest involves an interpretation of a statutory provision, and is therefore subject to de novo review. *Smith v Globe Life Ins Co*, 460 Mich 446, 458; 597 NW2d 28 (1999).

A. Plaintiff Did Not Submit Reasonable Proof Of The Fact And Amount Of The Loss At The Time He Submitted His Claim, As His Policy Had Been Nonrenewed And There Was No Reasonable Proof Of Coverage.

It is undisputed that defendant sent a notice of nonrenewal to the plaintiff for his automobile insurance policy, and that his policy expired on November 17, 1991. Plaintiff argued that the nonrenewal could not be enforced on the basis that defendant sent conflicting notices to the policyholder. This Court remanded the case for trial on the issue of estoppel. On remand, the jury found that defendant should be estopped from enforcing the nonrenewal, presumably on the basis that plaintiff was confused as to whether the policy had been nonrenewed. Because the jury found a contract by estoppel, Auto-Owners paid benefits and prejudgment interest on the principal benefits of $1,097,123.77 on September 5, 2000, before judgment was entered.

Despite this prompt payment, the trial court awarded an additional $278,092.69 in no-fault penalty interest, awarding penalty interest from the dates on which plaintiff submitted

various medical bills to Auto-Owners. (Dkt. # 216.) The issue of no-fault penalty interest is governed by MCL 500.3142, that provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery.
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

MCL 500.3142 (emphasis added). Under the terms of the statute, interest does not accrue on personal protection insurance benefits until there is "reasonable proof of the fact and amount of loss sustained," and the benefits are "overdue."

The statute, however, does not define what constitutes "reasonable proof of the fact and amount of loss sustained." Under the Court of Appeals' interpretation of the statute, the question of whether there is a valid policy in effect providing coverage at the time of the loss plays absolutely no role in the analysis of whether "reasonable proof" has been submitted that benefits are "due." In other words, benefits become "due" any time a claimant submits an application for benefits to an insurer, without regard to whether reasonable proofs are submitted that a policy is in effect. This interpretation renders meaningless the provisions in the No-Fault Act that provide that personal protection benefits are not due if the owner of a vehicle fails to maintain an insurance policy on that vehicle. For example, MCL 500.3113 expressly states that:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

***

> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

MCL 500.3113.[3] Plaintiff does not dispute that he needed an insurance policy in effect before he was entitled to personal protection benefits.

At the time that Morales submitted his first claim to Auto-Owners, his insurance policy had been nonrenewed and he had no policy in effect. He did not submit proofs indicating that Auto-Owners was estopped from relying on its nonrenewal provision in the insurance policy. He simply sent in medical bills seeking payment. Under these undisputed facts, there was no reasonable proof of the fact and the amount of the loss submitted that would trigger the obligation to pay no-fault benefits, as there was no proof of coverage provided. The provisions of Section 3142 do not apply until there is proof that a policy existed that would trigger the obligation to consider an application for payment of no-fault benefits.

In its Opinion, the Court of Appeals stated "[d]efendant does not dispute that plaintiff provided reasonable proof of the fact and of the amount of the loss sustained or that defendant failed to pay PIP benefits within thirty days of that date." (Opinion, p 2, n4.) This statement, upon which the Court's holding is based, is ***exactly wrong*** and demonstrates the clear error in the Court's decision. Auto-Owners has ***always*** disputed that it received reasonable proof of the fact and amount of the loss until such time that a showing was made that coverage was in effect at the time of the accident. This did not occur until after the Supreme Court remanded the case, and the jury concluded that estoppel should be applied to prevent defendant from relying on its nonrenewal of the insurance policy.

[3] Sections 3101 and 3103 define the situations where an owner or registrant is required to have an automobile insurance policy in effect. MCL 500.3101 and 500.3103.

For purposes of trial on remand, Auto-Owners did not contest the fact that plaintiff sent medical bills to Auto-Owners on particular dates, and that those bills reflected charges that were reasonably incurred for reasonably necessary services. The parties did ***not*** stipulate, however, that a policy was in effect providing coverage so that benefits became "due" or "overdue" for purposes of imposing no-fault penalty interest. The Court of Appeals apparently concluded that the stipulation regarding the dates when documentation was provided to Auto-Owners was a stipulation that plaintiff had submitted reasonable proof of the fact and the amount of the loss. This conclusion is totally unsupported by the record and overlooks the dispute at the crux of this case since the beginning.

At the time the claim was submitted, Auto-Owners had no proof of coverage because no policy was in effect. The trial court agreed originally with Auto-Owners that no contract existed between the parties at the time of the accident, as did the Court of Appeals. When the Supreme Court reversed, it did so on the basis that the doctrine of equitable estoppel could be used against an insurer to extend an insurance contract after the contract was nonrenewed, but only if the jury found certain facts on remand. Thus, even this Court did not find that a valid insurance contract existed between the parties requiring defendant to pay benefits at the time it reviewed the original record of this case. Instead, the Supreme Court remanded the case for the jury to make that factual determination.

The Supreme Court's decision, one of first impression on the issue presented, resulted in the subsequent jury trial on the question of estoppel, and the jury's finding that defendant was estopped from nonrenewing the contract. In this context, the "contract" requiring the payment of benefits did not exist until after the Supreme Court made its determination of the applicable law and the jury found the doctrine of estoppel should be applied. No reasonable proof of the fact

and amount of the loss could be found until after a showing was made that a contract was in effect and coverage existed for the claim. MCL 500.3101, 500.3105 and 500.3113. Because that showing was not made until the jury returned its verdict in this case, benefits were not "overdue" until 30 days after the jury's verdict was returned and the trial court entered judgment on that verdict, *i.e.,* October 27, 2000.

Under the Court of Appeals' interpretation of Section 3142, an insured is not required to make reasonable proof of coverage before personal protection benefits become "due" within the meaning of the statute. By finding that benefits become "due" any time a claimant submits an application for benefits to an insurer, without regard to whether reasonable proof of coverage is provided, the Court inappropriately rendered meaningless the requirement of the No-Fault Act that personal protection benefits are not due if the owner of a vehicle fails to maintain an insurance policy on that vehicle. *See e.g., Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002)("In such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.")

Furthermore, as this Court has stated, the amount of information that is required to trigger the obligation to pay benefits is highly fact specific and depends upon the benefits to be paid. *Cruz v State Farm Mutual Auto Ins Co*, 466 Mich 588, 596; 648 NW2d 591 (2002). Only after the reasonable proofs are submitted is there a clear obligation to pay or risk no-fault penalty interest. *Id.* Unless and until a showing is made that coverage is in effect as mandated by the statute, §3142 is not triggered and no benefits are due.

B. The Court of Appeals' Decision Is Contrary To The Purpose Of The No-Fault Penalty Interest Statute.

The Court of Appeals concluded that Auto-Owners' interpretation of Section 3142 was contrary to the "plain language" of the statute. (Opinion, p 2.) It is unclear what "language" the Court believes is "plain" with regard to the statute's application to this case. The language of Section 3142 starts with the assumption that the claimant is entitled to personal protection benefits. Other parts of the No-Fault Act define the situations where benefits are payable. Benefits are clearly not payable if the owner of the motor vehicle has failed to maintain insurance coverage as required by the Act. MCL 500.3113. The "plain language" of Section 3142 does not preclude an insurer from reasonably contesting whether any benefits are due before evaluating the proofs associated with the particular loss claimed.

At a minimum, the statute is ambiguous as two interpretations of the statute can be derived from its language. Under the Court of Appeals' interpretation, a claimant does not need to make a showing of coverage (*i.e.*, the entitlement to no-fault benefits), but only proof that medical bills were incurred, making the payment of those bills "due." Under another interpretation of the statutory language (that Auto-Owners submits is proper), a claimant must establish the existence of an entitlement to personal injury benefits under the Act, as well as reasonable proof that the expenses have been incurred before benefits are "due." Because of this ambiguity, the purpose of the penalty interest provision can be considered. *See e.g.*, *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996)(judicial construction authorized where a statute is unclear and susceptible to more than one interpretation).

The courts have held that the purpose of the no-fault penalty interest statute is to penalize a recalcitrant insurer for its misconduct in not making payment when due, rather than to compensate the insured for damages caused by the insurer. *Attard v Citizens Ins Co of America*,

237 Mich App 311, 316-317; 602 NW2d 633 (1999). As a statute that is penal in nature, §3142 should be strictly construed. *Sharpe v DAIIE*, 126 Mich App 144; 337 NW2d 12 (1983). In this case, there was no misconduct and no recalcitrance in making payment. There was a bona fide dispute regarding whether coverage existed, a dispute that even the Supreme Court recognized could not be resolved without a jury determination. Until that dispute was resolved by the jury, the benefits were not due, and the purposes of the No-Fault Act are not furthered by applying penalty interest to this case. This is particularly true here, where the trial court awarded no-fault penalty interest, and then slapped prejudgment interest on top, resulting in an effective interest rate on the judgment exceeding 20%.

C. The Conflicting Body Of Case Law On The Application Of Section 3142 Supports Granting Leave to Appeal In This Case.

This Court has addressed Section 3142 relatively few times, and never considered the question presented here. The decisions of the Court of Appeals on the applicability of Section 3142 are inconsistent and contradictory, making this case an appropriate one for the Court to determine the proper interpretation of Section 3142 and provide guidance to the lower courts on this issue.

Defendant has not located any case precisely on point with the facts presented here. However, this case is similar to *Sharpe v DAIIE*, 126 Mich App 144; 337 NW2d 12 (1983), where the Court of Appeals held that no-fault penalty interest was not recoverable. In *Sharpe,* the carrier reduced the amount of survivor benefits paid to the claimant by deducting the decedent's personal consumption factor from the benefits paid. The carrier changed its position and paid full survivor benefits after the Supreme Court issued its decision in *Miller v State Farm Mutual Automobile Ins Co*, 410 Mich 538; 302 NW2d 537 (1981), that established that such an offset was not appropriate. The sole issue presented in *Sharpe* was whether the carrier was liable

for no-fault penalty interest where it reduced the benefits paid based on the Court of Appeals decision in the *Miller* case (which was subsequently reversed). *Sharpe,*126 Mich App at 146. The *Sharpe* court held that the plaintiff was not entitled to penalty interest, reasoning as follows:

> In the within matter, defendant, in reliance on our appellate decision in *Miller*, *supra*, withheld the amount of decedent's wages which would have been exhausted by her personally. While a literal reading of the statute which provides for interest on overdue personal protection insurance benefits would require interest to be paid where benefits were not paid within 30 days after plaintiff's timely application for no-fault benefits, we believe that, under the circumstances of this case, defendant should not be held liable for interest on the overdue amount of benefits until April 9, 1981, 30 days after the Supreme Court issued its opinion in *Miller*, *supra*.
>
> We note that the special interest statute provides that "if reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer." Until the Supreme Court decision in *Miller*, plaintiff had not submitted proof of his right to the withheld sum of benefits, since the Court of Appeals had enunciated that the "personal consumption factor" was to be subtracted from the survivors' benefits.
>
> ***
>
> Inasmuch as the intent of the interest provision for overdue payments is not to compensate the insured, but rather to penalize an insurance company that is dilatory in paying a claim, we conclude that defendant's justifiable withholding of a portion of plaintiff's benefits should not subject it to an interest penalty.

126 Mich App at 149-150 (emphasis added). In this case, plaintiff did not submit proof of his right to receive benefits under the insurance contract until the jury determined a contract existed by virtue of estoppel. Until that time, Auto-Owners had no basis to conclude that it had sufficient proof that benefits were owed or that they were overdue. Accordingly, under the rule established in *Sharpe*, no benefits were due until 30 days after the jury's verdict was returned.

Similarly, various panels of the Court of Appeals have held that §3142 permits an insurer to contest the claim of the insured where the contest is a result of a legitimate question of statutory construction, case law, or bona fide factual uncertainty. When such an issue exists, it is reasonable for the insurer to pursue that issue and for benefits not to be due until the issue is

resolved. *See e.g., Lewis v Aetna Cas & Surety Co*, 109 Mich App 136, 139; 311 NW2d 317 (1981)("Where a reasonable dispute exists as to coverage or the amount of benefits owing, the insurer is allowed to contest the claim under the act without penalty"); *Kreighbaum v Automobile Club Ins Assoc*, 170 Mich App 583, 586-87; 428 NW2d 718 (1988)(the existence of a legitimate issue of the proper interpretation of the no-fault statute made it reasonable for the insurer to delay payment pending resolution of the question.); *Gobler v Auto-Owners Ins Co (on remand)*, 162 Mich App 717; 413 NW2d 92 (1987)(no penalty interest due because the insurer acted in good faith); and *Hannawi v American Fellowship Mut Ins Co*, unreported per curiam decision of the Court of Appeals dated November 12, 1999 (Docket No. 207629), 1999 WL 33430024 (attached as Ex. 3)(holding that "[g]enerally, an insurer's delay in making payments is not considered unreasonable where the delay is caused by a legitimate question of statutory construction, case law, or bona fide factual uncertainty.").

In *Copeland v Michigan*, unreported opinion per curiam of the Court of Appeals decided March 9, 2001, 2001 WL 716795, *lv den*, 636 NW2d 141 (2001) (Ex. 4)(a dispute arose from a 1997 motor vehicle accident where plaintiff was injured. The insurance carrier defendant, State Farm, issued checks in payment for medical bills jointly to the hospitals rendering medical treatment to the plaintiff and to plaintiff's attorney. The hospitals refused to negotiate the checks. The plaintiff subsequently filed suit, arguing that State Farm was obligated to pay no-fault benefits directly to plaintiff rather than the medical providers so that the plaintiff's attorney's lien arising from a prior action between the parties could be satisfied. The Court of Appeals disagreed, holding that State Farm could pay the medical providers directly. Because the benefits remained unpaid at the time of trial, plaintiff also sought no-fault penalty interest pursuant to §3142. The Court of Appeals denied the request, holding:

> We also conclude that penalty interest is not appropriate in the instant case because defendant State Farm was not dilatory in paying its claim. The purpose of the no-fault act's penalty provision is to penalize insurers for misconduct relating to no-fault claims. *Attard*, supra at 320. Our review of the record reveals that State Farm withheld payments partly to ensure that the State of Michigan and the hospitals received full payment before plaintiff's attorney deducted his fee. Because any delay did not result from State Farm's misconduct, penalty interest was not warranted here.

Copeland, 2001 WL 716795, *3. Here, Auto-Owners was not dilatory or recalcitrant in paying a claim. Once the jury's verdict was reduced to judgment, it promptly paid the full amount of benefits claimed to be due and owing. As a result, the trial court erred in determining that no-fault penalty interest was applicable in this case.

Despite the continuing validity of these cases, there are a number of contrary decisions issued by the Court of Appeals regarding the proper interpretation of § 3142, where the Court has held that the defense of the insurer is essentially irrelevant to the question of whether penalty interest is due. The majority of these cases have arisen in a context which is far different than the one presented here, where the insurance contract did not exist at the time of the accident but was later created by the court through the doctrine of estoppel. Typically, the issue presented in the cases considering § 3142 is whether the no-fault insurer can refuse to pay benefits under an insurance contract both parties agree exists, but the insurer challenges the charges incurred as either not reasonable or not reasonably necessary, or where there is a priority dispute between carriers. In these cases, the courts routinely hold that no-fault penalty interest is payable, and the insurer's good faith in not promptly paying the benefits is irrelevant. *See e.g.*, *Davis v Citizens Ins Co of America*, 195 Mich App 323; 489 NW2d 214 (1992)("[p]enalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits."); *Joiner v Mich Mutual Ins Co*, 161 Mich App 285; 409 NW2d 808 (1987)("defendant took the risk that it

would be ultimately liable for no-fault benefits, plus interest ... having lost its gamble, we believe defendant must now pay §3142 interest ..."); *Bach v State Farm Mut Auto Ins Co*, 137 Mich App 128; 357 NW2d 325 (1984) (priority dispute between two insurance companies is not a valid basis to deny penalty interest); and *Nash v DAIIE*, 120 Mich App 568; 327 NW2d 521 (1982) (good faith of the insurer irrelevant in applying penalty interest).

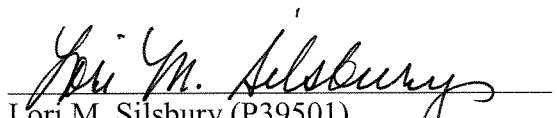
By granting leave in this case, the Court can provide guidance to the lower court as to whether an insurer can contest coverage without being subject to no-fault penalty interest. More specifically, the Court should hold that the Court of Appeals erred when it held that §3142 no-fault penalty interest applies where reasonable proof of coverage has not been provided by the policyholder, and there is a bona fide factual dispute regarding the existence of an insurance policy. The result reached by the Court of Appeals in this case is contrary to the language of the statute requiring that reasonable proof of the fact and amount of the loss be made before benefits become due or overdue.

RELIEF REQUESTED

For the reasons set forth herein, Defendant requests that this Court grant its Cross-Application for Leave to Appeal and reverse the decision of the Court of Appeals with respect to no-fault penalty interest awarded pursuant to Section 3142.

Respectfully submitted by,

DYKEMA GOSSETT PLLC

By: 

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Dated: November 18, 2002

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